(5)

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

No. 95-8736

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF FOR PETITIONER LARRY OSA OGBOMON

SUZANNE HASHIMI
Staff Attorney
Counsel of Record

R. GARY SPENCER
Staff Attorney
STEPHANIE KEARNS
Federal Defender

Attorneys for Petitioner
Larry Osa Ogbomon

Federal Defender Program, Inc.
Suite 3512, 101 Marietta Tower
Atlanta, Georgia 30303
404/688-7530

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

41 pp

QUESTION PRESENTED

Whether a district court has authority under 18 U.S.C. § 3583(d) to summarily deport a defendant who appears before the court for sentencing without affording the alien defendant the full range of protections and benefits guaranteed by Congress notwithstanding Title 8.

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTES AND GUIDELINES INVOLVED 1

STATEMENT 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT 12

I. THE LANGUAGE OF SECTION 3583(d) AND ITS HISTORY, WHEN READ IN THE CONTEXT OF EXISTING IMMIGRATION LAW AS WELL AS SUBSEQUENT LEGISLATION, SHOWS THAT CONGRESS DID NOT CONFER SWEEPING DEPORTATION POWER ON THE SENTENCING COURT 13

A. The Eleventh Circuit's Construction Of 18 U.S.C. § 3583 Does Violence To The Plain Meaning Of That Section 13

B. The History Of Congress' Treatment Of Aliens Demonstrates That It Did Not Intend § 3583(d) To Authorize Courts To Exercise Sweeping Power Over The Deportation Of Aliens 17

C. Section 3583(d) Should Be Read *In Pari Materia* With 8 U.S.C. § 1251 To Preserve The INS' Exclusive Authority Over Deportation Matters 22

D. Subsequent Legislation Shows That Congress Knows How To Provide For Judicial Orders Of Deportation And That It Does So Without Eliminating INS' Traditional Prerogatives 24

TABLE OF CONTENTS – Continued

Page

E. The Eleventh Circuit's Interpretation Of § 3583(d) Raises Significant Constitutional Concerns 25

F. The Eleventh Circuit's Interpretation Of § 3583(d) Is At Odds With The Traditional Allocation Of Authority Between The Executive And Judicial Branches Of Government In The Deportation Scheme 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

SUPREME COURT:

Ardestani v. Immigration and Naturalization Service, 502 U.S. 129 (1991) 14

Erlenbaugh v. United States, 409 U.S. 239 (1972) 22

Fang Ye Tang v. United States, 149 U.S. 698 (1893) 28

Graham v. Richardson, 403 U.S. 365 (1971) 26

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 28

Immigration and Naturalization Service v. Phinpathya, 464 U.S. 183 (1984) 14

In re Chapman, 166 U.S. 661 (1897) 27

Nyquist v. Mauclet, 432 U.S. 1 (1977) 26

Oceanic Steam Navigation Company v. Nevada N. Stranahan, 214 U.S. 320 (1908) 28

Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) 14

Shaughnessy v. United States, 345 U.S. 206 (1953) 28

Shaugnessy v. Mezei, 345 U.S. 206 (1953) 6, 28

The Chinese Exclusion Case, 130 U.S. 581 (1889) 28

The Japanese Case, 189 U.S. 86 (1903) 26

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) 28

United States ex rel. Turner v. Williams, 194 U.S. 279 (1904) 28

United States National Bank of Oregon v. Independent Insurance Agents, 508 U.S. 439 (1993) 14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Borden Co., 308 U.S. 188 (1939) 22

United States v. Zacks, 375 U.S. 59 (1963) 22

CIRCUIT COURT:

United States Chukwura, 5 F.3d 1420 (11th Cir. 1993) 2, 3, 4, 9, 14

United States v. Castillo-Burgos, 501 F.2d 217 (9th Cir. 1974) 19

United States v. Guevara-Martinez, 597 F.2d 954 (5th Cir. 1979) 19

United States v. Hernandez, 588 F.2d 346 (2d Cir. 1978) 19

United States v. Jalilian, 896 F.2d 447 (10th Cir. 1990) 19

United States v. Kassar, 47 F.3d 562 (2d Cir. 1995) 20

United States v. Montoya, 891 F.2d 1273 (7th Cir. 1989) 19

United States v. Oboh, 65 F.3d 900 (11th Cir. 1995) 3

United States v. Oboh, 92 F.3d 1082 (11th Cir. 1996) ..*passim*

United States v. Olvera, 954 F.2d 788 (2d Cir. 1992) 19

United States v. Phommachanh, 91 F.3d 1383 (10th Cir. 1996) 5, 20, 23

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995) 4, 17, 20, 21, 23, 26, 31

United States v. Ramirez, 948 F.2d 66 (1st Cir. 1991) 20

United States v. Sanchez, 923 F.2d 236 (1st Cir. 1991) 4, 20, 22, 23, 30, 31

United States v. Xiang, 77 F.3d 771 (4th Cir. 1996) 4, 11, 20

TABLE OF AUTHORITIES – Continued

Page

DISTRICT COURT:

Secchi v. United States Bureau of Immigration, 58 F.Supp. 569 (M.D. Pa. 1945) 19

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, art. I, § 8, cl. 4 ... 11, 25, 28

8 U.S.C. § 1101-1503 ..... 11, 13, 17

8 U.S.C. § 1103(a) 22

8 U.S.C. § 1158 10

8 U.S.C. § 1182(c) 10

8 U.S.C. § 1251 ..... 6, 9, 16, 22, 24

8 U.S.C. § 1251(b) (repealed 1990) 29

8 U.S.C. § 1252 ..... 6, 22, 23, 24, 27

8 U.S.C. § 1252(b) 6, 16, 17, 26, 27

8 U.S.C. § 1252a 11

8 U.S.C. § 1252a(d) 5, 16, 24, 26

8 U.S.C. § 1252b 10, 26

8 U.S.C. § 1253(h) 10

8 U.S.C. § 1254(a) 10

8 U.S.C. § 1254(e) 10

8 U.S.C. § 1326 ..... 2, 3, 24

18 U.S.C. § 1028(a)(1) 4

18 U.S.C. § 3563 ..... 20, 24

18 U.S.C. § 3583 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3583(d) ..... *passim*

18 U.S.C. § 4204 20

18 U.S.C. § 4212 ..... 9, 20, 21, 31

18 U.S.C. § 716 ..... 6, 18

21 U.S.C. § 844 3

28 U.S.C. § 1254(1) 1

Act of June 25, 1948, ch. 645, § 4204, 62 Stat. 854 20

Act of March 2, 1931, ch. 371, 46 Stat. 1469 ... 7, 18, 19

Alien Act of June 25, 1798 ..... 11, 28

Equal Access to Justice Act of 1988 14

Immigration Act of 1990, Pub. L. No. 101-649, § 505(a) 5, 30

Immigration and Naturalization Act of 1952 ..... 11, 24

Parole Commission and Reorganization Act, Pub.L. No. 94-233, § 4212, 90 Stat. 227 (Mar. 15, 1976) 20

Refugee Act of 1980 14

Sentencing Reform Act of 1984 21

TREATISES:

2A Sutherland Statutory Construction §§ 51.02, 51.05 (Sands 4th Ed. 1984) 9, 22

Frank L. Auerbach, Immigration Laws of the United States 1 (1955) 11, 28

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGULATIONS:

8 C.F.R. § 242 17

SENATE REPORTS:

S. Rep. No. 1733, 71st Cong., 3d Sess. 2 (1931)...18, 19

HOUSE REPORTS:

H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930) 19

MISCELLANEOUS:

10 Oxford English Dictionary 907 (2d ed. 1989) 16

12 Oxford English Dictionary 713 (2d ed. 1989) 16

Pub. L. No. 98-473, Tit.II, ch. 2, §§ 218(a)(5), 235, 98 Stat. 2027, 2031..... 21

OPINION BELOW

The opinion of the court of appeals is unreported. J.A. 15-16.

JURISDICTION

The judgment of the court of appeals was entered May 5, 1995. A timely petition for rehearing was denied on January 22, 1996. J.A. 17. The petition for a writ of certiorari was filed on April 22, 1996, and was granted on October 1, 1996. The jurisdiction of this court is authorized by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3583(d) is reproduced at App., *infra*.

STATEMENT

1. Petitioner originally arrived in this country in 1987 pursuant to a tourist visa. Presentence Report ("PSR") ¶4. His status was adjusted to that of a conditional resident alien on September 27, 1988. *Id.*

On February 14, 1991, Petitioner was convicted in DeKalb County, Georgia, of various felony offenses. He received five years probation with a condition that he not reenter the United States except through the Immigration & Naturalization Service ("INS") and under the name of Larry Ogbomon. PSR ¶5.

On June 10, 1991, Mr. Ogbomon entered a guilty plea in the United States District Court for the Northern District of Georgia to two counts of bank fraud. On August 30, 1991, he was sentenced to the custody of the Bureau of Prisons for 14 months. Upon release from imprisonment, Petitioner was placed on supervised release for three years with the special condition that he depart from the United States within four days. PSR ¶6.

Petitioner was released from the Federal Detention Center in Oakdale, Louisiana, on October 15, 1991, into the custody of the INS. INS records reflect that Petitioner was deported from the United States on November 20, 1991. His deportation was based on his conviction for multiple counts of fraud and forgery in DeKalb County, Georgia. *Id.*

Petitioner pled guilty in the instant case to illegal reentry after deportation, in violation of 8 U.S.C. § 1326. J.A. 1, 2. As part of his sentence, the district court ordered that he be deported and take "no action to appeal or resist any order of deportation by the Immigration & Naturalization Service[.]"[1] J.A. 12. Petitioner objected to the judicial order of deportation. J.A. 9.

2. The court of appeals affirmed, finding itself bound by its prior decision in *United States of Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *reh'g denied*, 14 F.3d 60 (11th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 102 (1994). In *Chukwura*, the

[1] The Petitioner was sentenced to sixteen (16) months imprisonment, to be followed by three (3) years of supervised release, during which time he was to remain outside the United States. J.A. 10-14.

Eleventh Circuit held that the plain language of 18 U.S.C. § 3583(d) authorized a district court to order deportation as a condition of supervised release. *Chukwura*, 5 F.3d at 1423. "The language is unequivocal and authorizes district courts to order deportation as a condition of supervised release, any time a defendant is subject to deportation." *Id.* Petitioner sought rehearing *en banc* in the instant case, but said petition was denied on January 22, 1996. J.A. 17-18. In seeking certiorari before this Court, the Solicitor General joined Mr. Ogbomon in arguing that the district court had overstepped its authority in ordering deportation.

Subsequent to the denial of relief to the Petitioner, the Eleventh Circuit again discussed the question of whether a district court has the authority to order deportation pursuant to supervised release. *United States v. Oboh*, 65 F.3d 900 (11th Cir.), *vacated*, 70 F.3d 87 (11th Cir. 1995) ("*Oboh I*"). A different panel of the Eleventh Circuit noted that the *Chukwura* decision would have the effect of "permit[ting] district courts to deport any deportable aliens without affording them any procedural safeguards with the exception of those aliens . . . convicted of crimes of moral turpitude or aggravated felonies." *Oboh I*, 92 F.3d at 902.

The Eleventh Circuit, *en banc*, addressed the *Chukwura* holding in light of the contrary decisions of the other circuits. *United States v. Oboh*, 92 F.3d 1082 (1996) (*en banc*) ("*Oboh II*"). In that consolidated appeal, Appellant Mitchel Augustus Bowen pled guilty to a two count information, charging that he violated 8 U.S.C. § 1326, illegal reentry after deportation, and 21 U.S.C. § 844, possession of marijuana. *Oboh II*, 92 F.3d at 1083. As part of his sentence the district court ordered that he be deported as

a condition of supervised release. *Id.* This order was over Bowen's objection to deportation *and his request that INS determine his asylum request. Id.*

Mr. Oboh pled guilty to two counts of producing false identification documents in violation of 18 U.S.C. § 1028(a)(1). *Id.* As a condition of his supervised release the district court ordered that the Government deport Mr. Oboh pursuant to 18 U.S.C. § 3583(d). Mr. Oboh objected, arguing that the PSR did not include a recommendation for deportation or any information regarding his immigration status, other than his place of birth (Ibadan, Nigeria) and the date on which he immigrated to the United States (1974). *Id.* The opinion does not reflect that the district court provided a forum for either Mr. Oboh or Mr. Bowen to defend against deportation. In a 7-5 decision, a majority reaffirmed the *Chukwura* holding. *Id.*

The majority again found that the plain language of 18 U.S.C. § 3583(d) authorized the district court to order an alien defendant subject to deportation to be deported as a condition of supervised release. *Oboh II*, 92 F.3d at 1084. The *Oboh II* majority noted that the First[2], Fourth[3], and Fifth[4] Circuits had held that the supervised release statute merely authorized the district court to order the surrender of a defendant to the INS for deportation proceedings in accordance with the Immigration & Nationality Act ("INA"). However, the Eleventh Circuit found

---

[2] *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991).

[3] *United States v. Xiang*, 77 F.3d 771 (4th Cir. 1996).

[4] *United States v. Quaye*, 57 F.3d 447 (5th Cir. 1995).

that those courts did not take into account other legislative developments, particularly the existence and elimination of judicial recommendations against deportation (See Immigration Act of 1990, Pub.L. No. 101-649, § 505(a)), and 8 U.S.C. § 1252a(d), which allows a district court to order deportation of alien defendants upon the request of the U.S. Attorney with the concurrence of the Commissioner of the INS. *Oboh II*, 92 F.3d at 1087.[5]

The majority also recognized that its "plain meaning" interpretation of § 3583(d) did not provide recourse equal to those procedures under the INA, but that only subsequent congressional action would provide a remedy for that dilemma. *Id.* The dissent would have adopted the approach taken by the other courts of appeal. *Id.* at 1088. First, the dissent thought that the language of § 3583 was ambiguous, in that the section states, in part, that "[t]he court may *provide* . . . that [the defendant] be deported and remain outside the United States, and may *order* that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d) (emphasis added). The use of the verb "provide", according to the dissent, was not inadvertent where the term "order" is used in other parts of the same statute, and therefore "provide" was logically interpreted to mean "make provision" for the deportation under the auspices of the INS. *Id.*

The dissent also found that § 3583(d), when interpreted as facilitating the surrender of defendants who are

---

[5] The Tenth Circuit has joined the majority of circuits in holding that § 3583(d) does not allow the district court to order deportation. *United States v. Phommachanh*, 91 F.3d 1303 (10th Cir. 1996).

subject to deportation to the INS for deportation proceedings, was consistent with the historical delegation to the Executive Branch from Congress regarding matters relating to immigration. This practice reflects the common understanding that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control." *Shaugnessy v. Mezei*, 345 U.S. 206, 210 (1953). The dissent also noted that the INA, in 8 U.S.C. § 1252 and its accompanying regulations, had established procedures to be used by the Attorney General in determining whether an alien who was charged with being deportable under 8 U.S.C. § 1251 was, in fact, deportable. It pointed out that § 1252(b) provides that "the procedures so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section," and that "[in] any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final." *Oboh II*, 92 F.3d at 1089. Therefore, the referenced deportation in § 3583(d) did not carve out an exception to the Executive Branch's authority over immigration matters. *Oboh II*, 92 F.3d at 1089 (Barkett, J., dissenting). Finally, the dissent found that the background of § 3583(d) supported its interpretation of the statute, finding that the statute it replaced, 18 U.S.C. § 716 (1925), governing the parole of prisoners, provided that

> where a federal prisoner is an alien and subject to deportation the Board of Parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of March 2, 1931, ch. 371, 46 Stat. 1469.

On October 1, 1996, this Court granted the writ of certiorari to resolve this issue.

SUMMARY OF THE ARGUMENT

Properly read, 18 U.S.C. § 3583(d) enables the sentencing court to require an alien, who is subject to deportation (a finding that must be made by the INS), to reside outside the United States during the term of supervised release. To effectuate this condition, § 3583(d) permits the district court to order the alien to surrender to an immigration official for deportation proceedings upon the completion of his custodial sentence.

Section 3583(d) does **not** authorize a sentencing court to order an alien to be deported. The Eleventh Circuit is alone amongst the courts of appeal in holding that through § 3583(d) Congress authorized district courts to deport aliens. The Eleventh Circuit's interpretation would create two parallel deportation processes: a civil administrative deportation and a criminal sentencing deportation. All other courts of appeal, that have dealt with this issue have held that § 3583(d) authorizes a district court

only to order an alien to surrender to the INS, which is the interpretation urged by Mr. Ogbomon.

The plain language of § 3583(d), the relevant rules of statutory construction, the statutory antecedents to § 3583, the legislative history, subsequent legislation, and the traditional roles occupied by the Executive and Judicial Branches of government in the context of immigration law all support this interpretation of § 3583.

The plain language of § 3583(d) militates against the Eleventh Circuit's interpretation and supports Petitioner's reading of the statute. The sentencing court is merely authorized to "*provide*" for the deportation of an alien – not to order it. Whereas, all other conditions of supervised release must or can be **ordered**, the district court may only **provide** for deportation in the event that an alien is "subject to deportation." Upon his release from prison, the alien could then be ordered to surrender to an immigration official for such deportation. This distinct choice of two different verbs to describe the district court's authority – "provide" and "order" – cannot be read interchangeably.

Rather than expanding the judiciary's authority, both the structure and the context of § 3583(d) reflects Congress' plain intention merely to provide an option other than the standard term of supervised release – that the alien remain in the district unless allowed to travel elsewhere – in order to allow the INS to effectively carry out a deportation after an appropriate administrative hearing.

In the absence of any indication of contrary congressional intent, the language of § 3583(d) must be read *in*

pari materia with the provisions of the INA. See 2A Sutherland Statutory Construction sections 51.02, 51.05 (Sands 4th Ed. 1984). The determination of whether an alien is "subject to deportation" requires reference to 8 U.S.C. § 1251. These two statutes, 8 U.S.C. § 1251 and 18 U.S.C. § 3583(d), can be read consistently only if the sentencing court's authority is limited to surrendering the alien to INS custody so that a deportation proceeding can be held.

The statutory antecedents to § 3583(d) support reading the statute as merely a recodification of the long-standing authority of the district court to order the surrender of an alien subject to deportation upon the completion of his custodial sentence. While the Eleventh Circuit acknowledged the similarity in the language of the former 18 U.S.C. § 4212 and the current § 3583(d), it ignored the absence of any language in § 3583(d) that indicates that Congress intended to bestow more authority on the district court than it had previously given to the parole commission in § 4212.

Recent amendments to the INA confirm that Congress did not intend § 3583(d) to grant the district courts the authority to deport aliens. These amendments also demonstrate that Congress is capable of being explicit when it wishes to expand the jurisdiction of the judiciary. The Eleventh Circuit in *United States v. Oboh*, 92 F.3d 1082 (11th Cir. 1996) (en banc), concluded that these amendments supported their holding in *United States v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 102 (1994). But the court does not explain why Congress would create such a detailed method of accomplishing a

judicial deportation if it had already previously granted this same authority more simply in § 3583(d). Furthermore, the new amendment only allows the district court to order deportation when it is requested by the Executive Branch, and both the United States Attorney and the Commissioner of the INS ask the district court to exercise its jurisdiction to do so.

At most the language of the statute is ambiguous, and it therefore is subject to the principle that where there are two interpretations of a deportation law, this Court is required to adopt the interpretation which favors the alien. Here, that principle dictates that Petitioner is entitled to adequate procedural safeguards, which are provided in 8 U.S.C. §§ 1158, 1182(c), 1253(h), 1254(a) and (e), and cannot be summarily deported at sentencing.

The Eleventh Circuit's interpretation of § 3583(d) places the provision in constitutional jeopardy, which is a strong reason to construe the statute as Petitioner proposes. Section 3583(d) would raise equal protection concerns by arbitrarily creating separate classes of aliens who would receive vastly different review and relief. It is highly unlikely that Congress would create a scheme so lacking in uniformity in the deportation laws. Indeed, it would be bizarre to assume that Congress would deprive one small group of aliens from receiving the due process afforded by 8 U.S.C. § 1252b without any explicit language.

Second, Petitioner is not an excludable alien who is arguably entitled to less constitutional protection. Rather, he has entered the United States and is a deportable alien, that is, an alien who is entitled to the procedures and

relief contained in the deportation process, as well as the constitutional protection of due process.

For nearly 200 years, Congress has delegated the authority to enforce the immigration laws to the Executive Branch. While Congress possesses the authority to promulgate laws governing the deportation of aliens, under the Constitution, Congress long ago exercised its constitutional authority by creating the Immigration and Naturalization Service as a part of the Executive Branch under the Attorney General. U.S. Const. art. I, § 8, cl. 4; Alien Act of June 25, 1798. The Attorney General was given "far reaching authority to deport aliens, with elaborately detailed procedures for exercising that authority. *See* generally 8 U.S.C. § 1101-1503." *United States v. Xiang*, 77 F.3d 771, 773 (4th Cir. 1996); Immigration and Nationality Act of 1952, 66 Stat. 182, as amended, 8 U.S.C. §§ 1101 *et seq*. Since 1798, this authority has been delegated exclusively to the Executive Branch, which to the present day continues to retain exclusive authority to initiate an order of deportation against an alien. Frank L. Auerbach, Immigration Laws of the United States 1 (1955); 8 U.S.C. § 1252. The power of the Executive Branch has been zealously guarded against judicial encroachment in the decisions of this Court.

Despite two centuries of consistent legislative and judicial tradition, the Eleventh Circuit has interpreted 18 U.S.C. § 3583(d) as a grant of plenary authority to the judiciary to deport aliens, without so much as notice to the alien being sentenced. The single sentence contained in § 3583(d) cannot sustain the sweeping change in

Congress' historic approach that the court below has assigned it. Accordingly, the decision below should be reversed.

ARGUMENT

The United States Court of Appeals for the Eleventh Circuit has held that a sentencing judge is empowered by 18 U.S.C. § 3583(d) to order an alien deported without an INS deportation hearing or an opportunity to seek relief from deportation. Properly interpreted, 18 U.S.C. § 3583 authorizes a sentencing court merely to anticipate and *provide for* the deportation of an alien who is determined deportable by the INS upon his release from custody as a condition of supervised release, and to provide that the term of supervision be served outside the United States. To effectuate this condition, the sentencing court plainly has authority to order the alien delivered to the INS. This interpretation of § 3583(d), which all courts except the Eleventh Circuit have adopted, is supported by the language of the statute, the rules of statutory construction, the statutory antecedents to § 3583(d), the legislative history, subsequent legislation, and the traditional roles occupied by the Executive and Judicial Branches of government in the context of immigration laws.

I. THE LANGUAGE OF SECTION 3583(d) AND ITS HISTORY, WHEN READ IN THE CONTEXT OF EXISTING IMMIGRATION LAW AS WELL AS SUBSEQUENT LEGISLATION, SHOWS THAT CONGRESS DID NOT CONFER SWEEPING DEPORTATION POWER ON THE SENTENCING COURT

The congressional choice between the words "provide" or "order" decisively shows that § 3583(d) does not grant district courts the jurisdiction to deport aliens. The context of § 3583 and its statutory antecedents further fortify Petitioner's interpretation. Section 3583(d) can only be read *in pari materia* with 8 U.S.C. §§ 1101-1503 by using Petitioner's interpretation. The Eleventh Circuit's interpretation, by contrast, is in direct conflict with both the statutory scheme existing when Petitioner was sentenced as well as the subsequent legislation. Because the statute is at least ambiguous, the construction favoring Petitioner must be adopted. Finally, the Eleventh Circuit's interpretation renders § 3583(d) subject to constitutional attack.

A. The Eleventh Circuit's Construction Of 18 U.S.C. § 3583 Does Violence To The Plain Meaning Of That Section.

Section 3583(d) states:

> [i]f an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States and may order that he be delivered to a duly authorized immigration official for deportation.

18 U.S.C. § 3583(d).

This Court has repeatedly noted that "in all cases involving statutory construction 'our starting point must be the language employed by Congress.' " *Immigration and Naturalization Service v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations omitted). The plain meaning of § 3583 is that aliens who have been found deportable by the INS can have such deportation permitted as a condition of their supervised release and the district court may order such aliens delivered to INS so that they may be so deported. It does not allow the district court to determine who may be deported.

Further, "[s]tatutory construction 'is a holistic endeavor,' and at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 455 (1993) (citations omitted). Finally, in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), in holding that the Refugee Act of 1980 did not apply to actions taken by the Coast Guard on the High Seas, this Court noted that it would have been "extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in legislative history." *Id.* at 176. *See also Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 137-38 (1991) (finding change in Equal Access to Justice Act was procedural rather than substantive where Congress gave no explanation for change).

The flaw in the Eleventh Circuit's analysis is its mistaken assumption that the word "provide" and the word "order" may be used interchangeably. The Eleventh Circuit, in *United States v. Chukwura*, 5 F.3d 1420 (11th Cir. 1993), *cert. denied*, 105 S.Ct. 102 (1994), held that § 3583 "plainly states that if a defendant is subject to deportation, a court may *order* a defendant deported 'as a condition of supervised release.' " *Id.*, at 1429 (emphasis added). But the court is simply wrong. What the statute says is only that "the court may *provide* . . . that he be deported . . . and may *order* that he be delivered to a duly authorized immigration official for such deportation." 18 U.S.C. § 3583(d) (emphasis added).

The Eleventh Circuit significantly altered Congress' statutory scheme when it substituted the word "order" for the word "provide". There is simply no reason to assume that Congress meant for these words used in the same provision to carry the same meaning. Instead, because Congress used both the words "provide" and "order" in § 3583, both must be read as having specific and distinct meaning. *See United States National Bank of Oregon, supra.*

The structure of § 3583 also supports Petitioner's interpretation of the district court's limited authority. Section 3583(d) empowers the court to impose three types of supervised release conditions: (1) mandatory; (2) discretionary; and (3) provisional. Specifically, the sentencing court is directed to "order" the defendant to follow three explicit mandatory conditions of supervised release. The court is further authorized to "order" appropriate discretionary conditions. Whereas § 3583(d) allows that a sentencing court "may order," all other discretionary conditions, the court's authority for deportation stands alone in a separate sentence as the only condition for which the court's authority is merely to "**provide**".

If Congress had chosen the word "order," it would have constituted a grant of authority to "command [or] authoritatively direct" deportations. 10 Oxford English Dictionary 907 (2d ed. 1989). By contrast, Congress chose the word "provide", which constitutes a direction to the court to "exercise foresight in taking due measure in view of a possible event." 12 Oxford English Dictionary 713 (2d ed. 1989). Thus, the statute allows only that in the event an alien is subject to deportation by the INS, then a court may make that deportation a condition of the alien's supervised release and order the alien delivered to the INS. The statute does not divest the Executive Branch of nearly two centuries of plenary authority to decide what to do with a particular alien.

Furthermore, the statute's requirement that an alien be "subject to deportation" limits the sentencing court's authority and only allows it to make deportation a condition of supervised release when the INS has deemed an alien deportable. The meaning of "subject to deportation" is not intrinsically apparent but rather requires reference to 8 U.S.C. § 1251 and § 1252(b), which define "deportable aliens" and the "proceedings to determine deportability". These statutes make it clear that it is the Attorney General, through INS, who determines eligibility for deportation. Title 8 U.S.C. § 1251 states that "[a]ny alien . . . in the United States shall, upon order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens." 8 U.S.C. § 1251. Similarly, 8 U.S.C. § 1252(b) provides that, aside from § 1252a(d), a deportation hearing *"shall be the sole and exclusive procedure for determining the deportability of an*

alien under this section." 8 U.S.C. § 1252(b) (emphasis added).

In contrast to the extensive procedural direction Congress gave the INS, no part of § 3583, or any statute, gives a district court the authority to determine which aliens are subject to deportation or what procedures the district court should follow in making such a determination. It would be extraordinary for Congress to give district courts, that are not even given jurisdiction to hear appeals from deportation proceedings, authority to conduct their own deportation proceedings without providing any directions, guidelines, or procedures as to how these decisions should be made. Indeed, the Eleventh Circuit's interpretation of § 3583 could result in as many varied approaches to determining who is deportable as there are district courts, as opposed to the uniform and detailed approach contemplated by Congress in 8 U.S.C. §§ 1101-1503 and their corresponding Federal Regulations. *See* 8 C.F.R. § 242.

B. The History Of Congress' Treatment Of Aliens Demonstrates That It Did Not Intend § 3583(d) To Authorize Courts To Exercise Sweeping Power Over The Deportation Of Aliens.

The history of 18 U.S.C. § 3583(d) supports Mr. Ogbomon's interpretation of the statute. "The history of this statute is a powerful argument that Congress never intended to alter this traditional allocation of power between the Article II and Article III branches of government." *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995).

More than 60 years ago, Congress responded to the practical problem involved in releasing an alien on parole who was subject to deportation. The supervisory nature of parole was considered inconsistent with releasing an alien defendant for the purpose of removing him from the United States and thus, his parole supervision. As a result, a number of aliens were caught in a "catch-22". The alien inmate could not obtain his release on parole because he was subject to deportation and yet he could not obtain a deportation proceeding without being released on parole. In a letter to Congress, Attorney General William D. Mitchell requested that a statutory mechanism to resolve the problem be adopted:

> At the present time there are several hundred inmates serving sentences in Federal prisons who should be deported. Under the present state of the law it has been deemed inconsistent to grant a parole and then immediately take the prisoner into custody under deportation proceedings. Specific authority to parole prisoners who are aliens and subject to deportation seems necessary.

S. Rep. No. 1733, 71st Cong., 3d Sess. 2 (1931). Subsequently, Congress amended 18 U.S.C. § 716 to provide:

> where a federal prisoner is an alien and subject to deportation the board of parole may authorize the release of such prisoner after he shall have become eligible for parole on condition that he be deported and remain outside of the United States and all places subject to its jurisdiction, and upon such parole becoming effective said prisoner shall be delivered to the duly authorized immigration official for deportation.

Act of March 2, 1931, ch. 371, 46 Stat. 1469.

The Committee Reports on the 1931 Act further demonstrate that the purpose of the law was to provide a method for the surrender of an alien prisoner so that deportation proceedings could be conducted; it was not to grant the parole commission the authority to actually order the alien deported. S. Rep. No. 1733, 71st Cong., 3d Sess. 1 (1931); H.R. Rep. No. 1035, 71st Cong., 2d Sess. 1 (1930). *See also Secchi v. United States Bureau of Immigration*, 58 F. Supp. 569 (M.D. Pa. 1945) (holding that the parole commission lacked the power to compel the immigration authorities to deport an alien prisoner).

Since *Secchi*, the courts of appeal have been required to determine whether the district court could make such a directive part of the sentence, or a condition of a special parole term, or a condition of probation. In each instance, the courts of appeal have reached the same conclusion: district courts lack the jurisdiction to order the deportation of aliens. *United States v. Olvera*, 954 F.2d 788 (2nd Cir. 1992), *cert. denied*, 505 U.S. 1211 (1992), (holding that a sentencing court cannot order deportation as a part of the sentence); *United States v. Guevara-Martinez*, 597 F.2d 954 (5th Cir. 1979) (holding that the judiciary lacks authority to order deportation); *United States v. Castillo-Burgos*, 501 F.2d 217 (9th Cir. 1974) (holding that a sentence of deportation was illegal); *United States v. Montoya*, 891 F.2d 1273, 1293, n.24 (7th Cir. 1989) (finding *in dictum* that the Attorney General has exclusive authority to initiate deportation proceedings); *United States v. Hernandez*, 588 F.2d 346 (2d Cir. 1978) (holding that a special parole term's condition of deportation was illegal); and *United States v. Jalilian*, 896 F.2d 447 (10th Cir. 1990) (holding that

a probationary condition of deportation pursuant to 18 U.S.C. § 3563 was illegal).[6]

The 1931 Act is "the initial predecessor of the current § 3583(d)", *Oboh II*, 92 F.3d at 1090 (Barkett, J., dissenting), and was recodified at 18 U.S.C. § 4204 (1952), *see* Act of June 25, 1948, ch. 645, § 4204, 62 Stat. 854, and again at 18 U.S.C. § 4212 (1976), *see* Parole Commission and Reorganization Act, Pub.L. No. 94-233, § 4212, 90 Stat. 227 (Mar. 15, 1976). The language of § 4212 is almost identical to the 1931 Act and bears a striking resemblance to § 3583(d) with one minor difference. Section 4212 was designed for the parole commission, which would directly "authorize the release of such prisoner." In the context of a parole term, the alien is only permitted to be released on the condition that he be deported. Unlike parole, supervised release is an independent term from the custodial sentence. The district court, which would not be responsible for the alien's actual release, is only authorized by Congress to "provide" for the alien's deportation at the conclusion of his custodial sentence by

[6] The majority of circuits which have visited the issue have similarly held that a district court has no authority to order an alien deported as a condition of supervised release under 18 U.S.C. § 3583(d). *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991) (per curiam); *United States v. Ramirez*, 948 F.2d 66 (1st Cir. 1991) (Breyer J.); *United States v. Kassar*, 47 F.3d 562 (2d Cir. 1995); *United States v. Xiang*, 77 F.3d 771 (4th Cir. 1996); *United States v. Quaye*, 57 F.3d 447 (5th Cir. 1995); and *United States v. Phommachanh*, 91 F.3d 1383 (10th Cir. 1996).

"order[ing]" his surrender to immigration officials upon the completion of his custodial sentence. *See Oboh II*, 92 F.3d at 1090; *Quaye*, 57 F.3d at 450.

The Eleventh Circuit concedes the similarity in language between § 3583(d) and its statutory antecedents. *Oboh II*, 92 F.3d at 1085. Despite this concession, the court of appeals fails to cite any substantive change in the language used in § 3583(d) which would support a finding that Congress intended to grant the district courts more authority to deport than in the predecessor statute, 18 U.S.C. § 4212.

The Sentencing Reform Act which was enacted in 1984 and became effective on November 1, 1987, abolished parole and instituted a new form of supervision for defendants who complete custodial sentences – supervised release. *See* Pub. L. No. 98-473, Tit. II, ch.2, §§ 218(a)(5), 235, 98 Stat. 2027, 2031. The nearly identical language contained in § 4212 and § 3583(d) compels the conclusion that Congress was merely empowering the district courts to "provide" for the alien's surrender at the completion of his custodial sentence just as the Parole Commission had previously been empowered to "authorize" the release of an alien to the INS when he became eligible for parole.

Moreover, contrary to the Eleventh Circuit's reasoning, the repeal of § 4212 and the enactment of § 3583(d) are related in a way that supports Petitioner's argument.

> [I]t is obvious that the sentence [in § 3583(d)] was patterned after the former § 4212 (footnote omitted). This background suggests that § 3583(d), like its predecessor governing parole, does not authorize a judicial order of deportation, but instead preserves the established procedures under the authority of the INS for effecting the deportation of an alien.

Oboh II, 92 F.3d at 1091 (Barkett, J., dissenting).

C. Section 3583(d) Should Be Read *In Pari Materia* With 8 U.S.C. § 1251 To Preserve The INS' Exclusive Authority Over Deportation Matters.

Under the doctrine of *in pari materia* where " 'there are two acts upon the same subject, the rule is to give effect to both if possible.' " *United States v. Zacks*, 375 U.S. 59, 67-68 (1963) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). Furthermore, Congress is presumed to enact new legislation with full knowledge of the existing law in that area. *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972). Because Congress did not express a contrary intent, 18 U.S.C. § 3583(d) must be read *in pari materia* with the INA. *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991); *see also* 2A Sutherland Statutory Construction §§ 51.02, 51.05 (Sands 4th ed. 1984).

Under the court of appeals' interpretation of § 3583(d), significant portions of 8 U.S.C. §§ 1103(a), 1251, and 1252 are rendered meaningless. This discord is not inherent in § 3583(d). A better way to read the statute is that

> § 3583(d) simply permits the sentencing court to order, as a condition of supervised release, that 'an alien defendant [who] is subject to deportation' be surrendered to immigration officials for deportation proceedings under the Immigration and Naturalization Act. In other words, following appellant's surrender to Immigration authorities, he is entitled to whatever process and procedures are prescribed by and under the Immigration and Naturalization Act for one in appellant's circumstances, for the purpose of determining whether he is 'an alien defendant . . . subject to deportation.'

Sanchez, 923 F.2d at 237. *Accord, United States v. Quaye*, 57 F.3d 447, 449 (5th Cir. 1995). This analysis allows the defendant his procedural protections and retains the INS' traditional authority to determine the issue of deportability.

The interpretation of the court below invokes an impossible situation because the central requirement that the alien must be "subject to deportation" involves a determination that the district court lacks jurisdiction to resolve. Title 8 U.S.C. § 1252 governs the procedure for determining which aliens are "subject to deportation" and the authority to decide that issue resides with the INS. *United States v. Phommachanh*, 91 F.3d 1383, 1386 (10th Cir. 1996). Only by reading the statute as the First Circuit did in *Sanchez* can this anomaly be avoided.

D. Subsequent Legislation Shows That Congress Knows How To Provide For Judicial Orders Of Deportation And That It Does So Without Eliminating INS' Traditional Prerogatives.

Title 18 U.S.C. § 3563, which governs the probationary conditions available, was amended to reflect that the sentencing court possesses the parallel authority to order the surrender of aliens on probation subject to deportation to the INS authorities. Notably, no additional language, which would support the Eleventh Circuit's interpretation that Congress meant for the sentencing courts to have the authority to deport aliens, was added to the language of that statute.

The INA was also amended in April, 1996, and more recently in September, 1996, to provide authority to the sentencing court to order the deportation of individuals previously specified by the Attorney General. The amendments create two new methods of deportation – a judicial deportation, pursuant to 8 U.S.C. § 1252a(d), and a stipulated deportation, pursuant to 8 U.S.C. § 1326. Prior to the amendment, deportations were governed by §§ 1251 and 1252. While the sentencing court now will be able to order deportation, it can do so only after receiving the prior approval of the United States Attorney and the INS. Thus, the court, under these amendments cannot initiate the deportation process *sua sponte*. These amendments cannot logically be squared with the judicial deportation adopted by the court below. It would be anomalous for Congress to subject some aliens to summary deportation and to leave that law in place, while then adopting another law giving those same aliens full procedural protections.

E. The Eleventh Circuit's Interpretation of § 3583(d) Raises Significant Constitutional Concerns

Congress is directed by the Constitution to create a "uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl.4. The very nature of this grant of authority demonstrates the critical importance, whenever possible, of construing statutes which affect aliens to promote uniformity. In essence, the Eleventh Circuit has created an independent means of summarily deporting an alien without the prior approval or review of the INS. The Eleventh Circuit's assumption of plenary authority to deport aliens threatens the uniformity of the process. The threat to the uniformity in deportation proceedings was anticipated by the dissenting opinion in *Oboh II*:

> [T]o read a general power of judicial deportation into § 3583(d), in light of this intervening amendment to § 1252a, would permit district courts to deport some aliens convicted of relatively less serious crimes without affording them any procedural safeguards, with the inapposite result that aliens convicted of particularly heinous crimes would receive the more expansive procedural checks available within the auspices of the Attorney General and INS.

Oboh II, 92 F.3d at 1091 (footnote omitted) (Barkett, J., dissenting) (citations omitted).

In this regard, the Eleventh Circuit's interpretation is inconsistent with the principles of Equal Protection and Due Process. "In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them

into harmony with the Constitution." *The Japanese Case*, 189 U.S. 86, 101 (1903). It is wholly arbitrary to create this class of aliens who are deprived of the protections of the immigration laws which protect aliens. Such a classification cannot survive a heightened scrutiny analysis which is mandated since aliens are a suspect class which is entitled to heightened scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 8 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

Title 8 U.S.C. § 1252b as well as its predecessor, which was in effect when Mr. Ogbomon was sentenced, guarantees aliens due process during their deportation proceedings by requiring INS to issue an order to show cause, notice, a hearing, an opportunity to seek relief from deportation, the right to secure and proceed with counsel, and a review of the findings. 8 U.S.C. §§ 1252(b) and 1252b. The Eleventh Circuit's summary deportation does not provide such protections and indeed, the court conceded that "we do not contend that these safeguards [those provided to aliens at the sentencing hearing where the defendant is deported] afford defendants recourse from deportation equal to that available under the Immigration and Nationality Act." *Oboh II*, 92 F.3d at 1087.

The Eleventh Circuit has created an arbitrary distinction amongst aliens whereby aliens who have been convicted of an aggravated felony receive more procedural protection than those aliens who have illegally entered such as Mr. Ogbomon. *United States v. Quaye*, 57 F.3d 447, 450 (5th Cir. 1995) (noting that § 1252a(d) would provide procedural safeguards to those convicted of heinous crimes while other aliens would receive none under § 3583). Such a distinction cannot survive a basic rule of

statutory construction: "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." *In re Chapman*, 166 U.S. 661, 667 (1897). The interpretation favored by the majority of circuits would not create these constitutional concerns. The Eleventh Circuit's decision would permit the district court to enter a binding final order of deportation against permanent resident aliens and individuals who are otherwise entitled to relief from deportation. This final order of deportation can be entered against the alien arbitrarily and without the procedural protections contained in 8 U.S.C. § 1252(b).[7] Indeed, the Eleventh Circuit concluded in *Oboh II*, that the failure to notify an alien that he is facing deportation at his sentencing hearing did not deny him due process. *Oboh II*, 92 F.3d at 1088.[8] Such an "absurd result" could easily follow if the Eleventh Circuit's decision in *Ogbomon* is upheld.

---

[7] Petitioner was not provided with notice of the grounds for deportation, or allowed an opportunity to obtain immigration counsel, or permitted to review the evidence against him and rebut the same or seek any discretionary relief from deportation or make an asylum claim.

[8] The Eleventh Circuit has given "notice" a new definition. Rather than acknowledging that a defendant is entitled to be notified by the United States Attorney or the INS that there will be a deportation proceeding initiated against him at the sentencing, as is required by 8 U.S.C. § 1252, the court found that the mere existence of the statute, § 3583(d) was sufficient notice. *Oboh II*, 92 F.3d at 1088.

F. The Eleventh Circuit's Interpretation Of § 3583(d) Is At Odds With The Traditional Allocation Of Authority Between The Executive And Judicial Branches Of Government In The Deportation Scheme.

The Constitution provides that: "The Congress shall have Power To establish an uniform Rule of Naturalization, . . . " U.S. Const. art. I, § 8, cl.4. Congress, pursuant to its power to govern immigration law, passed the Alien Act of June 25, 1798, which provided the Executive Branch with the authority to act in immigration matters. Frank L. Auerbach, Immigration Laws of the United States 1 (1955).

This Court has repeatedly recognized the power of Congress to govern the admission and deportation of aliens and to delegate this authority to the Executive Branch. *The Chinese Exclusion Case*, 130 U.S. 581 (1889). *See also United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Oceanic Steam Navigation Company v. Nevada N. Stranahan*, 214 U.S. 320, 339-40 (1908) ("the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject. . . . "); *Shaughnessy v. United States*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments **largely immune from judicial control**") (emphasis added); *Fang Ye Tang v. United States*, 149 U.S. 698 (1893); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

Despite the clear delegation of authority to the Attorney General, the Eleventh Circuit concluded that Congress *sub silentio* granted the Judicial Branch, for the first time, the authority to deport aliens, a power possessed by the Executive Branch for virtually two hundred years. In essence, the Eleventh Circuit has found that in 1987, Congress radically changed the balance of power by delegating the authority to deport to the judiciary. "From 1798 to the enactment of § 3583(d) in 1987, the Executive Branch retained exclusive authority to order the deportation of aliens." *Oboh II*, 92 F.3d at 1086, n. 4.

To support this extraordinary shift in authority, the court of appeals relies upon the history of federal judicial authority to issue a judicial recommendation against deportation ("JRAD"). 8 U.S.C. § 1251(b) (repealed 1990). Under § 1251(b), the district court could recommend whether the offense for which the defendant was being sentenced should be characterized as a crime of moral turpitude. If the court found that an offense did not involve moral turpitude, the INS was prohibited from deporting the alien based on that conviction alone. According to the Eleventh Circuit, this history demonstrates a congressional willingness to allow the judiciary an opportunity to participate substantially in the deportation process.

Despite the limited nature of the district court's authority to affect the deportation process by granting a JRAD, the Eleventh Circuit relies upon this history in concluding that Congress has broken with the past by giving the judiciary the ability "to thwart INS's ability to deport" through the JRAD. *Oboh II*, 92 F.3d at 1086. The fact that § 3583(d) was enacted in 1987, three years before

the JRAD was abolished in 1990, plays a significant role in the Eleventh Circuit's analysis:

> The plain meaning of § 3583(d) taken together with abolishment of JRADs, a longstanding mainstay in the criminal process, not only persuades us that Congress intended to enable district courts to order the deportation of defendants 'subject to deportation,' but in fact favors such deportation when either the Executive or Judicial Branch deems it appropriate.

Oboh II, 92 F.3d at 1087. But, the abolition of the JRAD cannot bear the weight the court of appeals assigns to it in interpreting § 3583(d). The JRAD was a modest incursion into the deportation process. The INS still possessed the authority to deport an alien on any other cognizable ground, so that the district court's finding did not protect the alien from deportation. Further, the district court's authority to make such recommendations was abolished in 1990. Immigration Act of 1990, Pub. L. No. 101-649, section 505(a). Contrary to the Eleventh Circuit's interpretation of the history of the JRAD, the loss of the district court's authority to issue a JRAD suggests a movement away from providing judicial control which binds the INS.

It is inconceivable that Congress would alter the scheme *sub silentio*, so as to allow the judiciary to summarily deport aliens without affording aliens any of the "elaborately detailed procedures" of the INS. *Oboh II*, 92 F.3d at 1090 (Barkett, J., dissenting); *United States v. Sanchez*, 923 F.2d 236 (1st Cir. 1991). Specifically, aliens deported under § 3583(d) would be deprived of not only a deportation proceeding with its attached protections of

notice and an opportunity to be heard, but more importantly the opportunity to obtain asylum or other discretionary relief available in INS proceedings. Only by narrowly construing the statute is it possible to engage in "no derogation of appellant's procedural rights, nor does it arrogate any executive power vested in the Attorney General to determine appellant's deportability." *Sanchez*, 923 F.2d at 237-8.

The Fifth Circuit was similarly impressed by tradition in refusing to find that

> Congress intended to undermine that executive prerogative *sub silentio* in section 3583(d), or that Congress intended by its silence to deprive aliens deported at sentencing of such relief as alien asylum, which the Attorney General may grant. We insist on greater clarity of purpose when a statute would be read to upset a status quo long in place.

Quaye, 57 F.3d at 450. In the absence of such clarity, § 3583(d) must be interpreted as a mere recodification of § 4212.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SUZANNE [illegible]HIMI
R. GARY SPENCER
STEPHANIE KEARNS

On the brief:
J.C. SALYER

APPENDIX

STATUTE INVOLVED

18 U.S.C. § 3583(d) Conditions of Supervised Release:

* * *

> If an alien defendant is subject to deportation the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.